

ENFORCEMENT

2008: Compliance and Enforcement Report

In 2008 the Massachusetts Department of Environmental Protection ("MassDEP") continued to implement a strong enforcement program, at the same time raising the bar and increasing compliance by recognizing and encouraging best business practices. MassDEP has worked to combine our robust enforcement presence with increased education, outreach and technical assistance for the regulated community.



Our efforts in 2008 included expanding the use of both traditional and new methods of reporting and measuring, thereby enabling us to better gauge and assess both

enforcement results and increased compliance activity. To that end, the 2008 report focuses on three different measures:

1. **Return to Compliance Results;**
2. **Alternative Measures of Compliance and Enforcement;** and
3. **Traditional Enforcement Measures.**

1. RETURN TO COMPLIANCE RESULTS:

In an effort to track "return to compliance results," one of MassDEP's Regional Offices launched a pilot study to review a significant portion of higher level enforcement actions (Administrative Consent Order or "ACO" and Administrative Consent Order with Penalty or "ACOP"). These enforcement documents had been issued from 2005 to 2008, and many had multi-year compliance schedules. The results of this review confirmed that most violators who choose to

Snapshots of Compliance – Summary of Return to Compliance Results

Chapter 21E: 411 cases



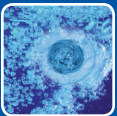
- 93% Compliance - (383 cases)
- 71% Closed, no further action required
- 22% Open and in compliance
- 7% Compliance outstanding due to financial issues such as ability-to-pay (28 cases)

WETLANDS: 128 cases



- 95% Compliance - (122 cases)
- 5% Compliance outstanding (e.g., failure to monitor, submit reports, perform restoration, or pay penalty) (6 cases)
- 100% Compliance with Supplemental Environmental Policies

WASTEWATER: 76 Cases



- 91% Compliance – (69 cases)
- 9% Compliance outstanding (e.g., missed deadlines) (7 cases)

DRINKING WATER: 13 cases



- 100% Compliance – (13 cases)



Enforcement actions help municipalities return to compliance so that they can take advantage of programs like the State Revolving Fund Program. As a result, municipalities have invested millions of dollars in major construction work and improvements to Combined Sewer Overflow (“CSOs”), Sanitary Sewer Overflow (“SSOs”) and wastewater treatment systems.

Combined Sewer Overflows	\$ 482 million
Sanitary Sewer Overflows	\$ 129 million
Waste Water Treatment Plant Upgrades	\$ 20 million

settle a case successfully returned to compliance. The small percentages of these cases that are in noncompliance face stipulated penalties and further enforcement.

2. ALTERNATIVE COMPLIANCE AND ENFORCEMENT MEASUREMENTS:

MassDEP also continues to work to quantify the non-traditional measures of success that result directly from enforcement actions. These mea-

sures, combined with traditional measures such as penalty dollars and compliance rates, provide a three-dimensional view of MassDEP’s work. In 2008, our enforcement actions yielded important environmental benefits, including reduced ozone emissions, reduced asbestos particles released to the air, proper cleanup of contaminated soils, and protected drinking water for Massachusetts citizens.

Over the past several years, MassDEP has undertaken an effort to develop objective measures to help evaluate compliance and to better inform our targeted and strategic enforcement. To that end the Bureau of Waste Prevention has developed a process which started

with “lessons learned” from evaluating the agency’s Environmental Result Program (“ERP”) and expanded efforts over the past few years to strategically plan inspections to target the highest environmental risks.

This strategy, “Beyond ERP Compliance Targeting,” combines: periodic inspection of large sources of emission and discharges; single or multi-year studies of targeted groups; and assessment surveys of large numbers of smaller sources. The regular inspection of large sources of emissions or discharges satisfies our federal funding obligations and ensures that MassDEP has an active presence at facilities where a violation could result in



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Environmental Gains Through Enforcement

Ozone emissions reduced:	378,000 lbs
Asbestos emissions prevented:	31,000 lbs
Contaminated Soil cleaned up:	53,000 cubic yards
Safe Drinking Water:	377, 000 people benefited



Targeted Group Studies - Outcomes and Examples

ERP Dry Cleaners – 32 inspections resulted in 15 NONs for recordkeeping violations and 3 higher level enforcement (HLE) (no HLE concerned excess discharge or emissions - 91% substantial compliance)



Auto Salvage & Junk Yards- 93 Inspections resulted in 25 NONs for recordkeeping and “minor” waste management violations (i.e. lines, lids, labels) and 5 higher level enforcement actions, of which 3 were based on excess discharges or emissions(95% substantial compliance)



Stack Testing Air Emissions – 161 inspections resulted in 4 NONs and 3 higher level enforcement actions, 1 of which was based on excess emissions. (98% substantial compliance)



Unpermitted/Unregistered Source- 84 inspections resulted in 29 NON and 9 higher level enforcement actions (89% substantial compliance)

the greatest release to the environment.

This strategy relies on Targeted Group Studies and Assessment Surveys which utilize a different approach to determining compliance at large numbers of sources.

Targeted Groups Studies: Targeted groups are specific types of facilities where experience suggests we might expect to find violations. Since 2005, 132 “targeted groups” have been visited for a total of 1,129 inspections. From these inspections 316 Notice of Noncompliance or “NONs” were issued for “minor” violations, mostly recordkeeping and housekeeping

practices. The inspections also resulted in 115 higher level enforcement actions including penalties, orders and referrals to the Attorney General’s Office. Twenty-six of these cases, 22% of the higher level enforcement cases, involved excess emissions or discharges to the environment.

Statistical Assessment Surveys: MassDEP has evaluated large classes of facilities using a random selection of facilities to inspect. During the 2005 to 2008 period several large groups of regulated facilities were the subject of this random inspection program to determine an unbiased overall compliance rate. In total, 1,760

inspections were conducted and only 5 cases resulted in higher level enforcement actions, 4 of which were linked to excess emissions and discharges.

These groups included:

- Dischargers of industrial waste water in unsewered areas - 99% substantial compliance
- Hazardous Waste Small Quantity Generators - 98% substantial compliance
- Air Major Sources - 98% substantial compliance
- ERP Dry Cleaners - 94% substantial compliance

The “Beyond ERP” approach provided important results regarding compliance status of specific regulated sectors, results which have been utilized to design appropriate regulatory oversight strategies based on compliance rates and potential impact to the environment. Importantly, the analysis demonstrated that in many sectors, the regulated community is in substantial compliance with the regulations. MassDEP will continue its efforts to expand upon this approach, to develop a systematic method for planning, deploying agency resources, assessing performance and reporting results.

3. TRADITIONAL ENFORCEMENT MEASURES: The traditional enforcement measures for fiscal year 2008 reflect two trends: deterrence and targeted use of lower level enforcement tools.

In preceding years MassDEP had a marked increase in higher level enforcement actions taken and penalties assessed, with a peak in 2006. As expected, a consistent and robust enforcement presence in the field has an effective deterrent effect on noncompliance. Our strategic and visible enforcement efforts are designed to ensure that the regulated community remains aware of our presence and is encouraged to perform at their highest level, employing best management practices ("BMPs") that exceed regulatory requirements. In fact, many are doing exactly that, as demonstrated by the impressive audit results of the Beyond ERP Compliance Targeting Project described above.

Second, in 2008, the Department directed significant resources to increase lower level enforcement or the use of Notices of Noncom-

pliance ("NONs") within select programs. In the right situations, NONs give violators a chance to cure and return to compliance allowing for immediate compliance upon discovery of a violation. MassDEP issued 2,791 NONs in 2008, 458 more than were issued in 2007. The practical effect of this effort is that more violators get a chance to come into compliance



before facing higher level enforcement including order, penalty and referral to the Attorney General's Office. Of course, violators who received NONs in 2008 and failed to return to compliance are now facing higher level enforcement that includes penalties and referral to the Attorney General's Office.

An additional benefit of the Beyond ERP approach is that it assists MassDEP in identifying industry groups that need help with compliance before problems at individual facilities come to light through inspections. Going forward, MassDEP will continue to look for opportunities to provide compliance and technical assistance.

OTA

TURI

AIM

CMBEN

Compliance Assistance for the Coating Industry: In 2008, MassDEP organized and hosted a compliance assistance seminar for over 75 companies in Central and Northeastern Massachusetts, with a focus on industrial coatings. The need to assist this industry came to light as a result of an inspection and resulting enforcement action. MassDEP teamed up with the state Office of Technology Assistance ("OTA"), Toxics Use Reduction Institute ("TURI") and Associated Industries of Massachusetts ("AIM") and Central Massachusetts Business Environmental Network ("CMBEN") to provide technical outreach to help ensure that companies had the knowledge and know-how to operate in compliance. The presentation from the training session is available at MassDEP's website at

www.brainshark.com/brainshark/vu/view.asp?pi=702577310

Planned Use of NONs - Two Initiatives

Safe Neighborhood Chemical Initiative:



In 2008, the Department continued this partnership with Department of Fire Services (“DFS”), to provide compliance assistance, following joint audits/inspections, of 45 facilities. All of these facilities are located in highly populated areas and use various chemicals in their industrial processes. These 45 inspections and the follow-up assistance provided redirected enforcement resources and provided good results. This joint effort was made possible by the cooperation of the companies involved and as well as Associated Industries of Massachusetts (“AIM”) and other industry organizations. As a result, these companies were able to improve their operating practices, thereby improving their safe operations and protecting their environment. This effort also preserved the company’s economic health and enhanced worker safety. Everyone involved benefited from this initiative.

Of course, MassDEP does act promptly when we discover an immediate threat during the course of these inspections. To that end, MassDEP issued a Unilateral Administrative Order to a facility that was mishandling large quantities of ammonia, and provided technical support for a DFS enforcement order against a facility that had allowed the unpermitted accumulation of potentially explosive dust particles. These and the other facilities inspected as part of this effort received compliance assistance and received a short window within which to return to compliance.

21E NonResponders:

Similarly, in the Chapter 21E program, MassDEP issued 636 NONs to Potentially Responsible Parties (“PRPs”) for 313 sites. The NONs included a compliance deadline of January 30, 2008. 148 of the 313 sites, or 47%, have returned to compliance.

83 of the remaining 165 sites are subject to circumstances involving financial inability to pay, municipal tax-takings, or good faith efforts to complete required work. Accordingly, as those matters are being resolved, further enforcement at those sites is on hold. The remaining 82 sites are the subject of higher level enforcement actions including penalties, orders and referral to the Attorney General’s Office.



In addition, the cases MassDEP referred to the Attorney General’s Office resulted in \$2.2 million in penalties and fines. MassDEP, working through its Environmental Strike Force (“ESF”), continues to refer significant violations for civil or criminal enforcement through the Attorney General’s Office. Effective enforcement utilizes all the available resources whether

pursued administratively by MassDEP, or civilly or criminally with the assistance of the Attorney General’s Office or other enforcement agency. A few higher level enforcement cases from 2008 are highlighted below.

Administrative Enforcement – BATG Environmental, landfill closure and capping

BATG Environmental was the operator hired by Millville to close and cap an inactive unlined landfill. In settling the enforcement action for failure to complete cap and closure, BATG Environmental entered into a schedule and agreed to paid \$102,070 penalty. The MassDEP suspend payment of \$18,000 of that penalty provided that BATG remains in compliance.

Building on Enforcement Results

Some enforcement initiatives continue to evolve each year and have become part MassDEP's "daily" work.

Wetlands Change



The Wetlands Change Initiative, which involves comparative analyses of aerial and historical photo images, coupled with wetlands "ground truthing," remains a hallmark of the wetlands program. In 2008, nine wetlands change enforcement cases resulted in over 1.87 acres of restored wetlands and the stabilization of over ten construction sites.

Candid Camera – Catching Illegal Dumpers



By 2008, the list of municipalities that partnered with the Department to catch illegal dumpers using covert surveillance cameras had grown to 15. Most of these cases are handled at the municipal level, with MassDEP providing investigative and technical support. Some municipalities have now purchased their own equipment and have updated their bylaws to increase the penalty for dumping. One large city has established a revolving fund so that penalties directly support enforcement and site clean-up.

Stage 2 Vapor Recovery



Clean air remains a top MassDEP priority and the compliance rate of gasoline stations continues to improve. In 2008, that rate remained close to 98%, continuing a growing compliance trend that spans several years and that has grown from 54% at the outset of this initiative to close to 100% today.

Criminal Enforcement – Commonwealth v. Pan Am Railroad and Subsidiaries

Pan Am Rail Road was indicted in April 2008, for failure to report a release of oil or hazardous material under Chapter 21E, the state Superfund law. The investigation, conducted by MassDEP Emergen-

cy Response staff and ESF investigators, revealed that an idling locomotive at Pan Am's rail yard in Ayer had a spilled hundreds of gallons of diesel fuel onto the ground. MassDEP alleged that Pan Am failed to report this release and instead tried to cover it up. (The case went to jury trial in 2009

and resulted in a guilty verdict on all 8 felony counts and a \$400,000 penalty against the company.)

Civil Enforcement: Commonwealth v. Brandywine Corporation
MassDEP Environmental Strike Force investigated and developed this case for referral to the Attorney General's Office. The case concerned the alleged unpermitted alteration of five acres of freshwater wetlands on a parcel now used for automobile auctions. The settlement that was entered by the court required the owner to restore a portion of the altered wetlands, pay \$200,000 towards wetlands enhancement in the Concord River Watershed and pay a \$50,000 civil administrative penalty, plus \$50,000 more upon failure to complete the agreed upon restoration.

GOING FORWARD . . .

MassDEP's efforts will continue to provide technical outreach and assistance with a goal toward ensuring that the regulated community knows the rules and has an opportunity to "work out the bugs" of new requirements before MassDEP engages in inspections and enforcement. The environment is best served by a combination of efforts; working to ensure that all parties have the needed information on how to comply, followed by inspections and audits and enforcement for those who do not comply.